Military Reprisal Investigations

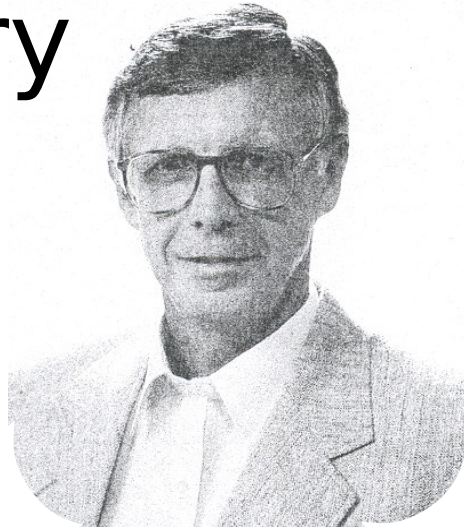
Agenda

- Overview
  - How we got here
  - How are we doing
- Preliminary Inquiries
- Reprisal
- Mental Health Referrals

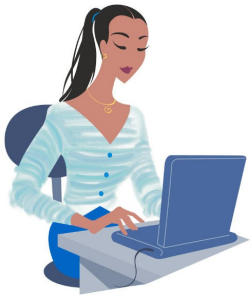
MRI's Mission

- Conduct / oversight investigations of:
  - Reprisal
  - Improper MHE referrals (Military)
- Establish Whistleblower policy for:
  - Military
  - NAFI Employees
  - Defense Contractor Employees
- Develop implementing regulations

Whistleblower Protection
A Dynamic History

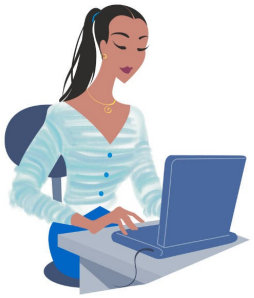


. . . and MRI was there!



Development of the Law

- **1978** – Federal employees
- **1983** – NAFI employees
- **1986** – Defense contractor employees
- **1988** – Boxer Amendment
  - "Military Whistleblower Protection Act"
  - Only IGs & Congress

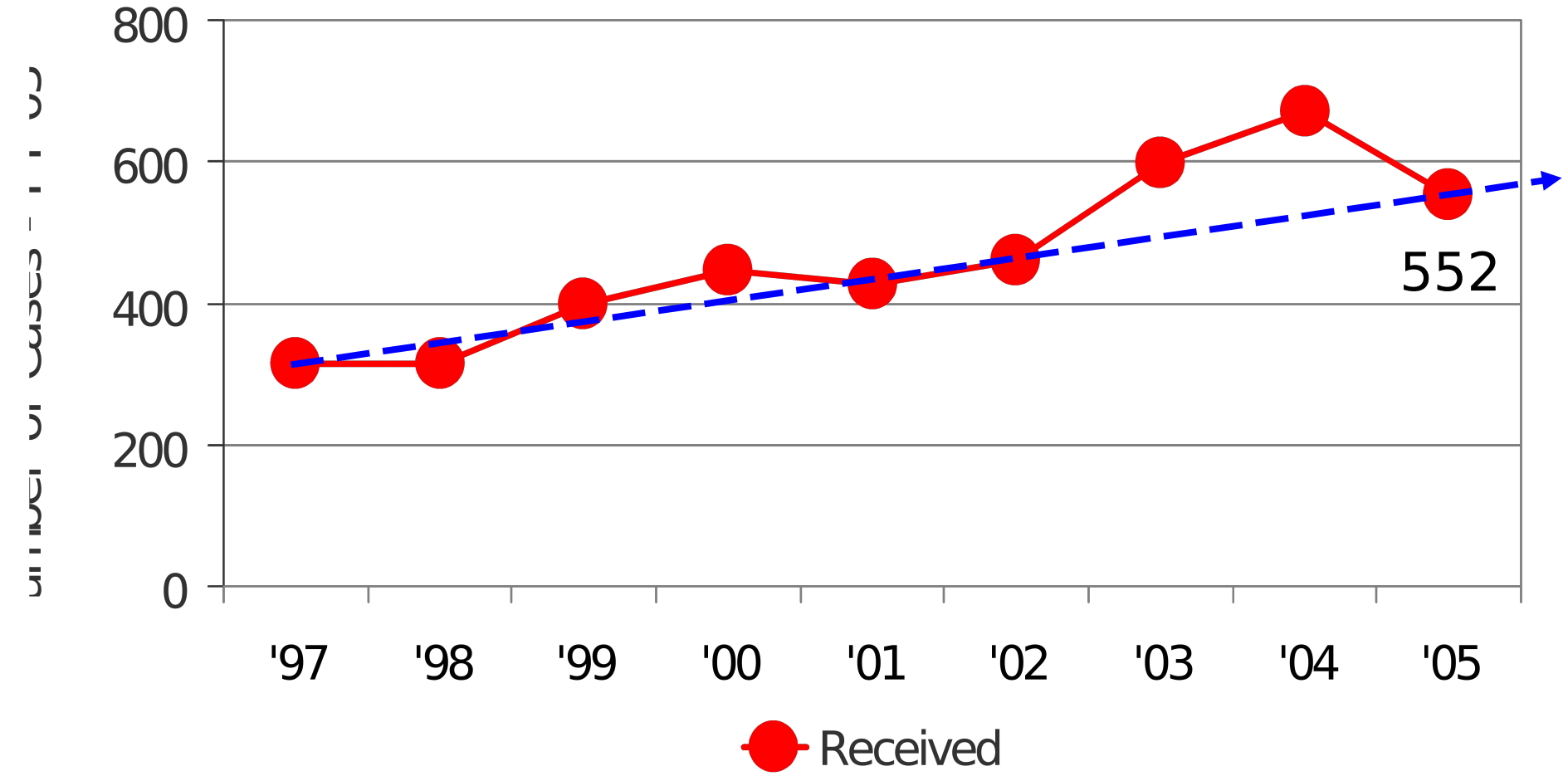


Development of the Law

- **1990/92** – MHE as reprisal
- **1991** – DoD Auditors, Inspectors, and LE
- **1994** – Chain of command, discrimination, sexual harassment
- **2004** – Clarification and emphasis

Let’s put this in perspective

Reprisal / MHE



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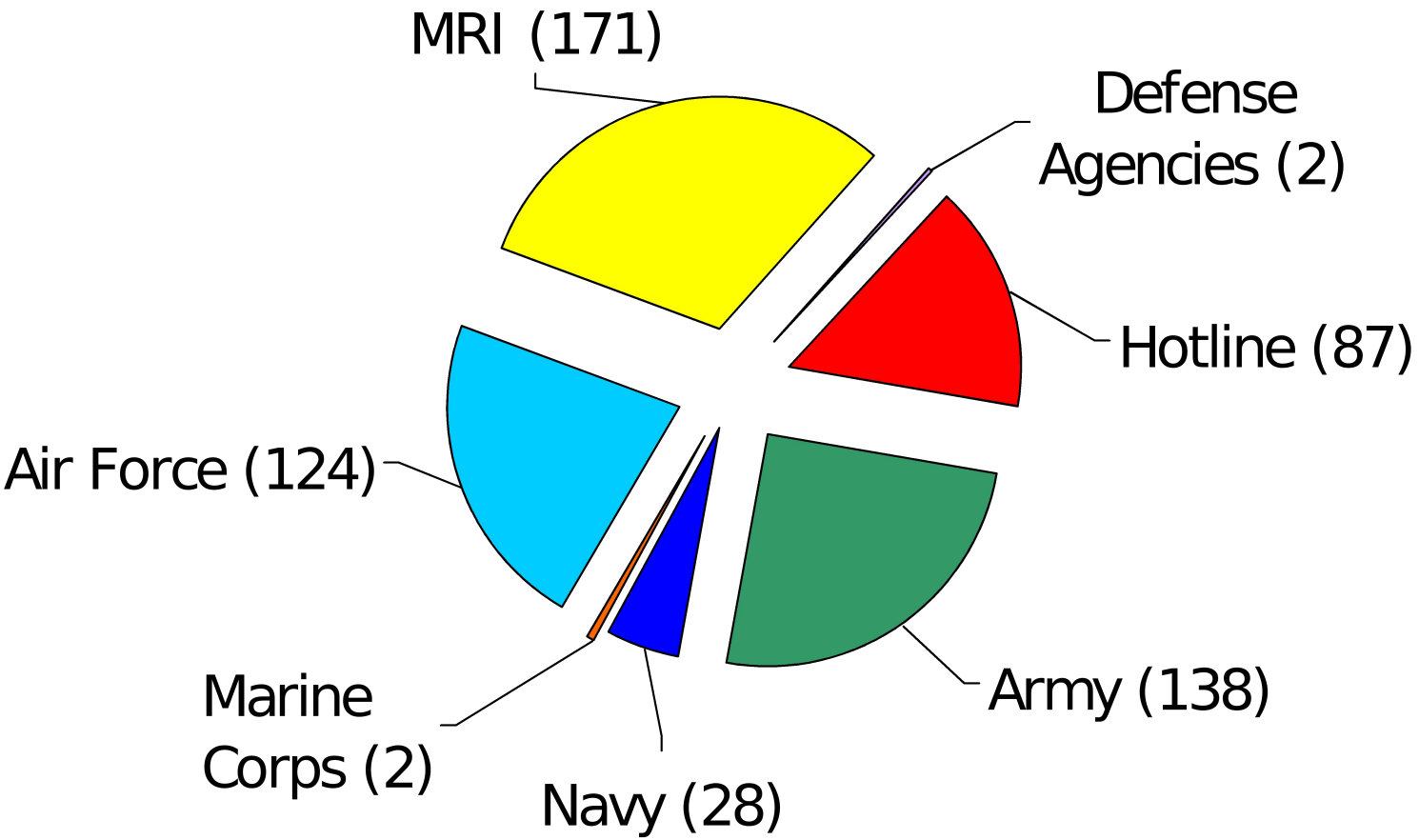
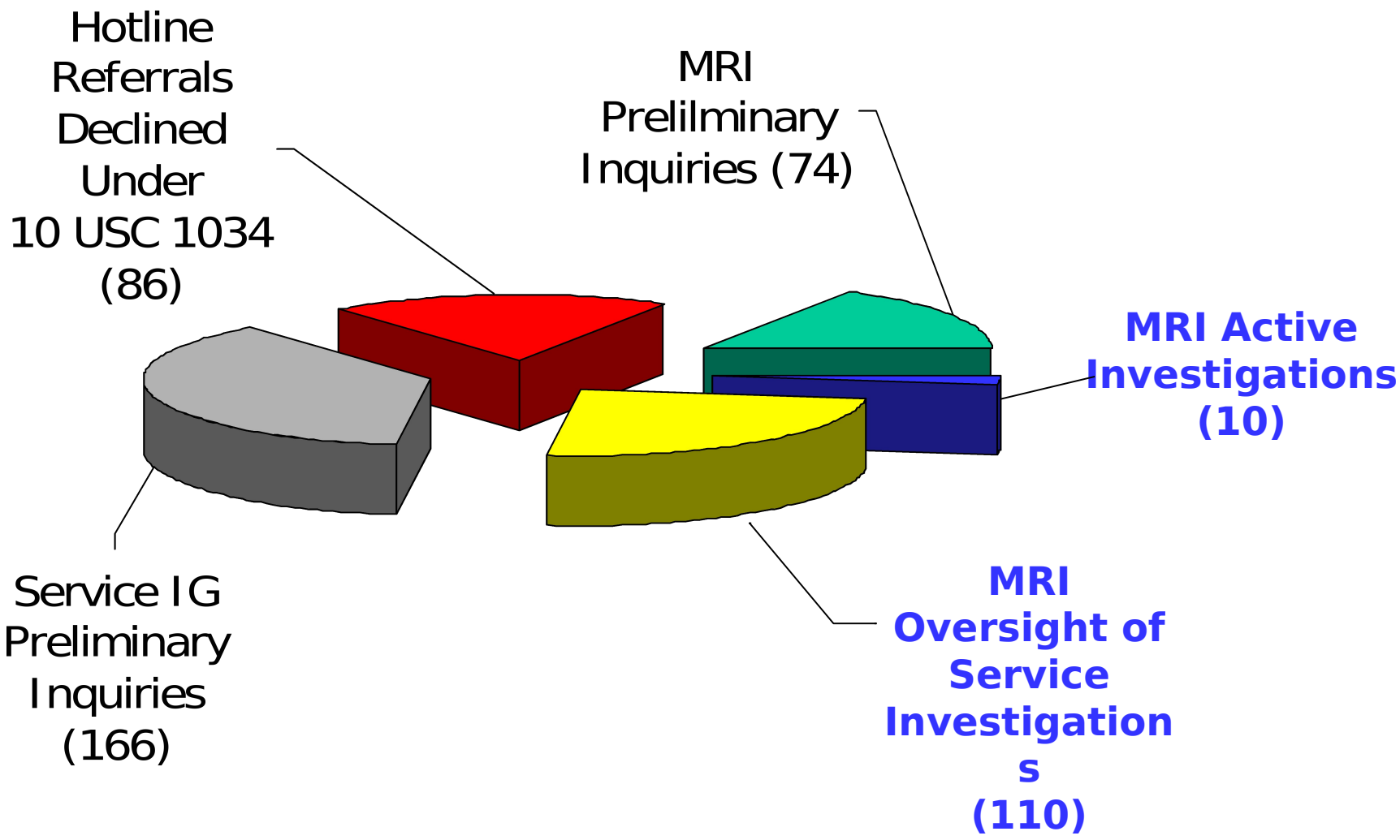


Closed - 446


Hotline Referrals Declined Under 10 USC 1034 (86)
MRI Prelilminary Inquiries (74)
MRI Active Investigations (10)
Service IG Preliminary Inquiries (166)
MRI Oversight of Service Investigations (110)

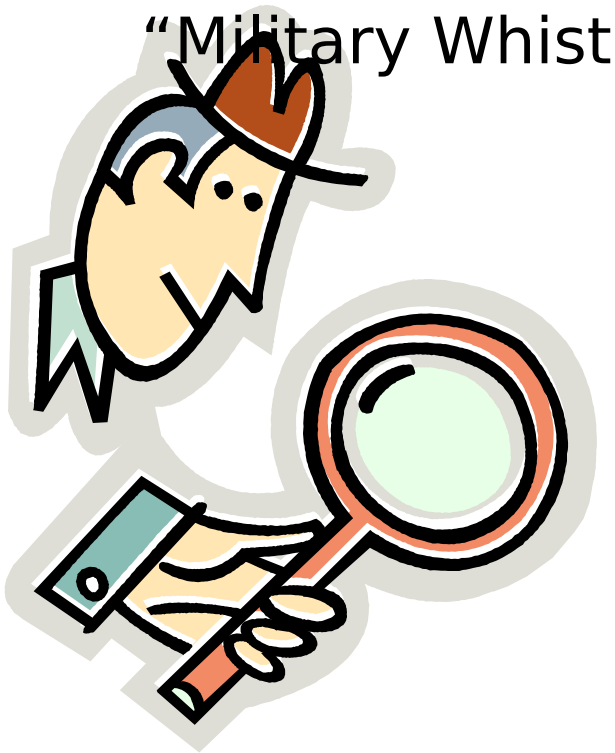
Substantiation Rate

- Reprisal
  - Historical ~20 - 25%

Note: Substantiation rate for reprisal cases is based on cases that met the statutory criteria for full investigation. Cases not included were those that revealed no further investigation was warranted after preliminary analysis or inquiry.

Title 10, United States Code, Section 1034

"Military Whistleblower Prtotection Act"



Restrictio

n

Reprisal

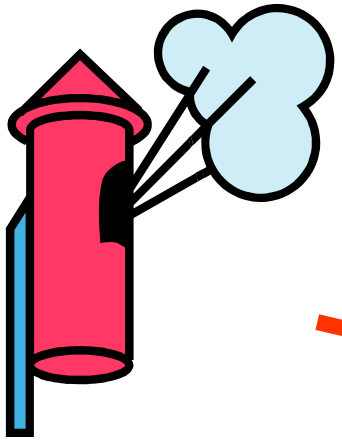
Restriction

"(a) Restricting Communications With Members of Congress and Inspector General Prohibited.

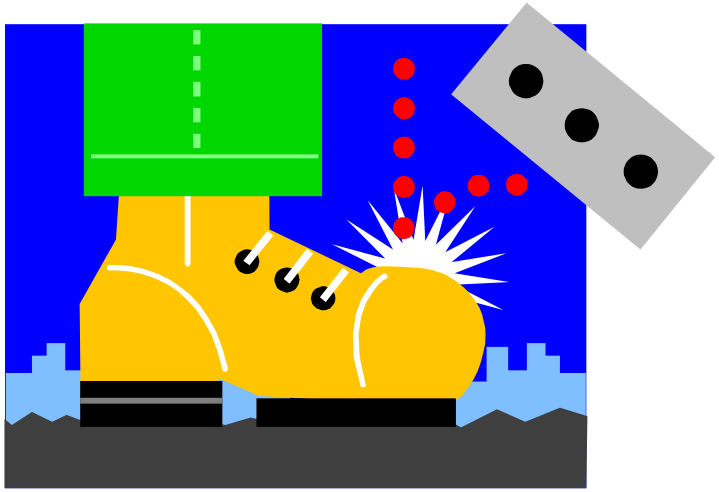
(1) No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General.

(2) Paragraph (1) does not apply to a communication that is unlawful."

Reprisal

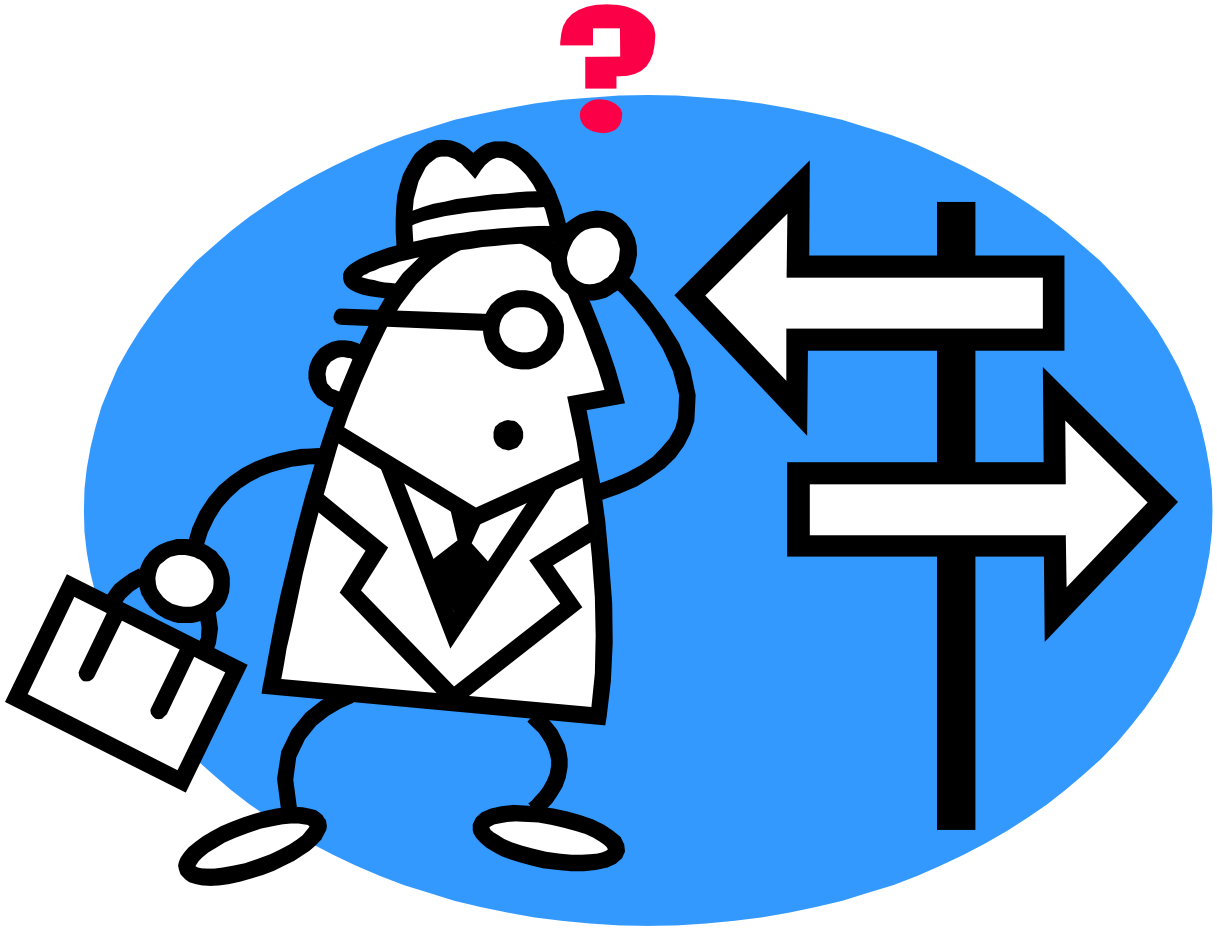


RMO
motive

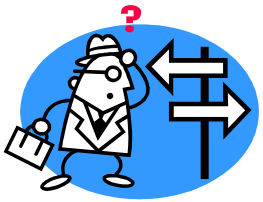


The “Acid Test”

1. Protected Communication?
2. “Unfavorable” Personnel Action?
3. Management Knowledge?
4. Reprisal or Independent Basis?

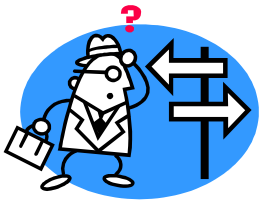


Where to start



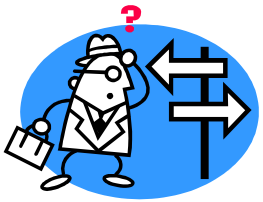
Initial Contact

- Intake
  - The complainant may not say reprisal
- MRI notification
  - *10 days from initial contact*
- Preliminary Inquiry



Preliminary Inquiry

- Questions 1-3
- Based mostly on documentation
  - Incoming complaint, personnel records
  - Previous investigations
- Complainant interview
  - Normally do not interview RMOs or witnesses
- End product
  - ***Close or refer for investigation***



Investigation

- Questions 1-4
  - Emphasis on Q-4
- Testimony and documentation
  - *Interview witnesses and RMOs*
- **Establish linkage between PC and UPA**
- Legal review

1

“Acid Test”

2

4

3

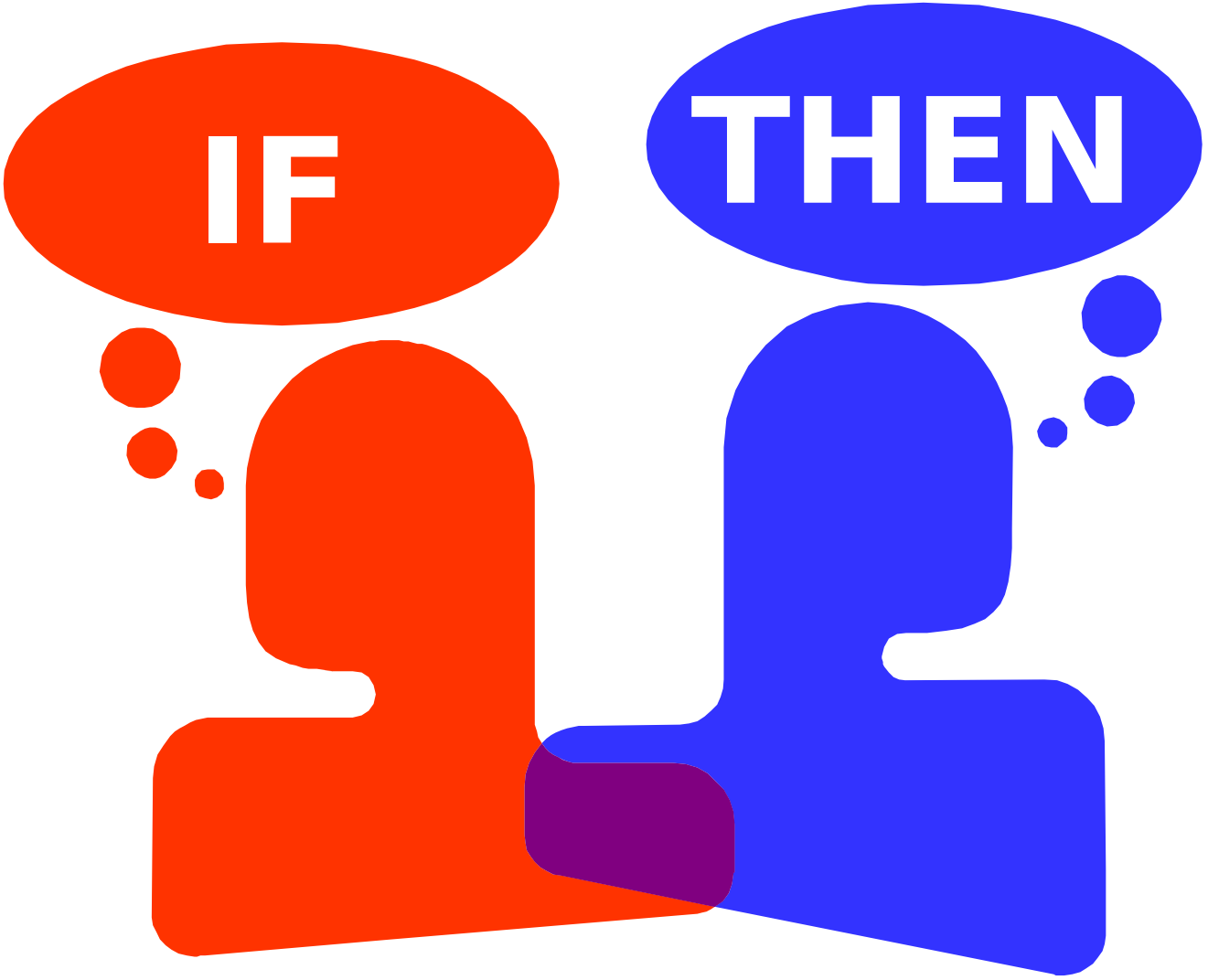
Protected Communication

Did the military member

- make
- prepare to make,
- or was thought to have made

a communication protected by statute?

Who Can Receive a PC?



Who Can Receive a PC?

IF

the communication was made to

an IG or

a Member of Congress

THEN

any lawful communication is protected

Who Can Receive a PC?

IF

- the communication was made to
  - DoD audit, inspection, investigation, or law enforcement organization
  - any person or organization in the *chain of command*
  - any other person or organization designated pursuant to regulations or other established administrative

Concerning?

- any lawful communication which the member reasonably believes evidences:
  - A violation of law or regulation (including sexual harassment or unlawful discrimination)
  - Gross mismanagement or gross waste of funds
  - An abuse of authority, or
  - A substantial and specific danger to public

Concerning?

THEN

- any lawful communication which **the member reasonably believes evidences**:
  - A violation of law or regulation (including sexual harassment or unlawful discrimination)
  - Gross mismanagement or gross waste of funds
  - An abuse of authority, or

Protected Communication

Did the military member

- make
- prepare to make,
- or was thought to have made

a communication protected by statute?

What can be a PC?

- Verbal, written, or electronic (phone, fax, email)
- Third party (spouse, relative, or co-worker) on behalf of complainant
- Chain of command communications
  - *May include complaints made during commander's call, request mast, or under open door policy. Articles 138 and 1150 are usually protected communications*

Protected Communication

For **each** PC you must determine:

- *To whom* was the PC made?
- *What* was the PC?
- *When* was the PC made?
- *Disposition* of communication.

Protected Communication

Timing is critical

- Date rumors started about the complainant intending to make a PC
- Date complainant began preparing to make a PC
- Date the actual PC was made

Test Your Knowledge

1. Capt Scotty announced at a recent Commander's Call that he believed his supervisor discriminated against him because of his religious beliefs.

2. A1C Kirk's commander believes she was the source of an anonymous call to the IG (however, A1C Kirk denies she ever contacted the IG).

Test Your Knowledge

3. Lt Traveler's mother wrote the Hotline complaining that her son would be deployed on her birthday and he would be unable to attend her party.

4. SSgt Sweettooth wrote to his Congressman complaining that the lunch line was too long, and by the time he got around to dessert, the pecan pie was always gone.

Protected Communication

What if…

- No evidence of a PC?
- Allegation of wrongdoing was not substantiated?
- PC was made in retaliation against management officials?

"Unfavorable" Personnel Action

An **unfavorable** personnel action,

taken or *threatened* or

a **favorable** personnel action *withheld*

or *threatened* to be withheld

following the protected communication?

"Unfavorable" Personnel Action

Any action that *unfavorably*

affects, or

has the **potential** *to unfavorably*

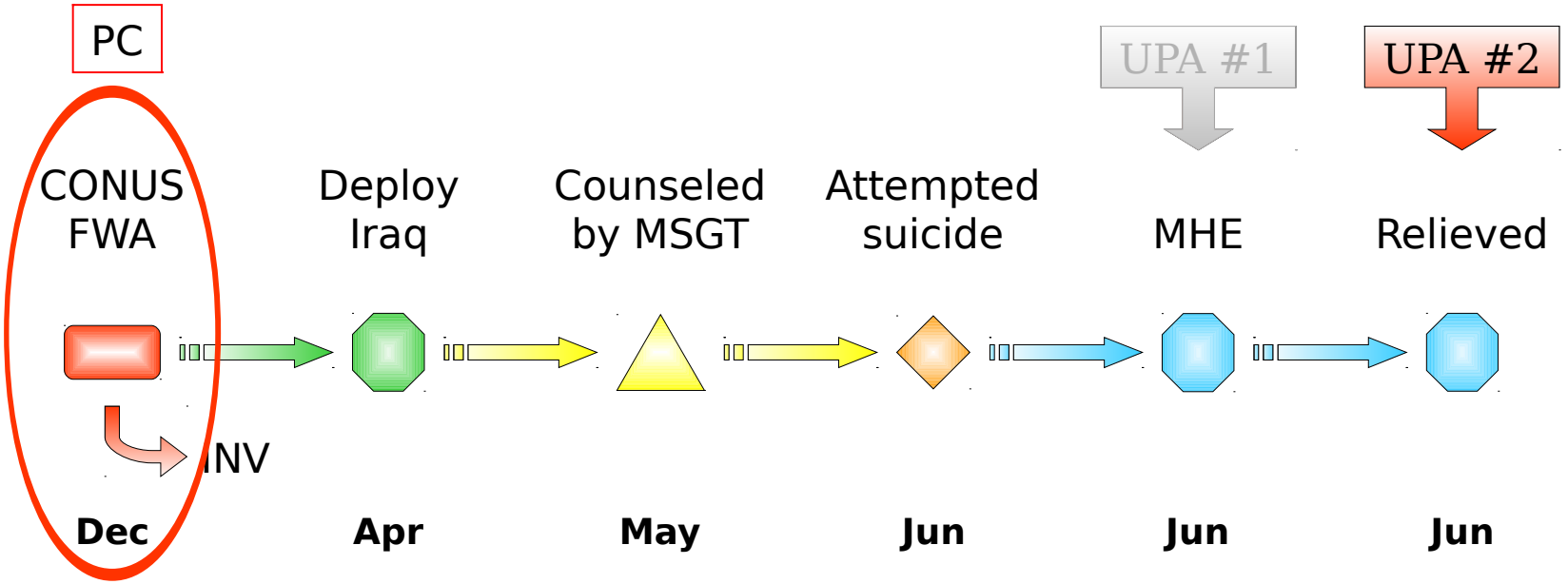
affect,

a Service member's

UPA Examples

- Fitness Report / Performance Evaluations
- Awards, promotions, or training
- Changes to duties or responsibilities

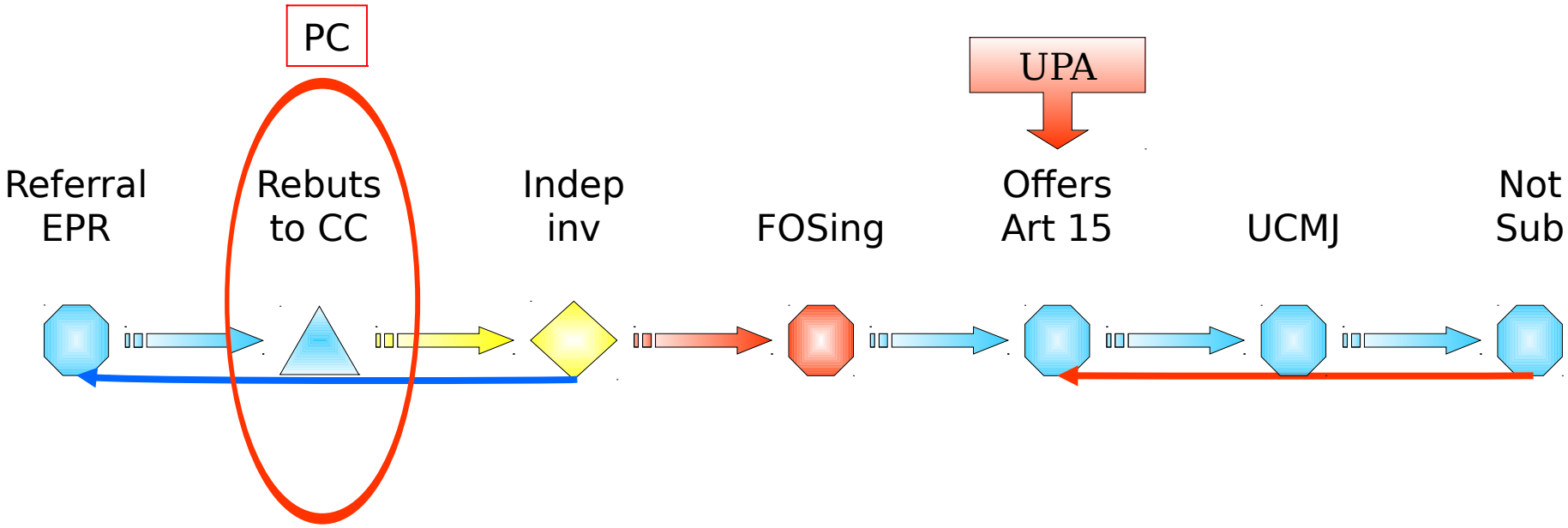
SGT Jeremiah, Supply



UPA Examples

- Fitness Report / Performance Evaluations
- Awards, promotions, or training
- Changes to duties or responsibilities
- Denial of reenlistment or separation
- Disciplinary or other corrective actions (Page 13, Article 15, Captain’s Mast)

Sgt Glass, Flying Squadron



UPA Examples

- Revocation of:
  - access to classified material
  - authorization to carry weapons
  - changes in flying status
  - Personnel Reliability Program certification

Key: Was the action discretionary?

Investigations

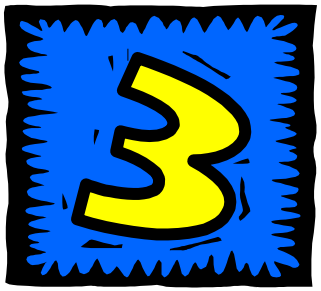
Investigations are fact finding tools and are not considered UPAs

- However, actions taken as a result of an investigation may be considered an UPA

"Unfavorable" Personnel Action

What if…

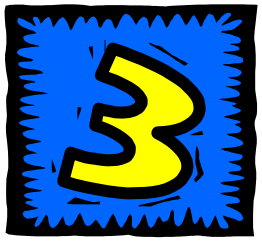
- The RMO did not consider the personnel action to be "unfavorable"?
- The personnel action was subsequently reversed?
- There was no personnel action?



RMO

Knowledge

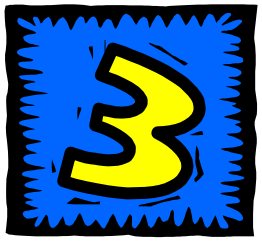
“a 2-step process”



Step 1: Who is an RMO?

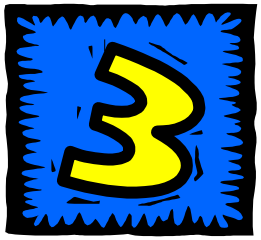
Anyone who:

- Took the action
- Approved, reviewed, or endorsed the action
- Signed correspondence regarding the action
- Influenced or recommended the action be taken



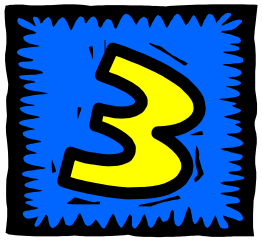
Step 2: Knowledge

Determine if each RMO had prior knowledge of each PC



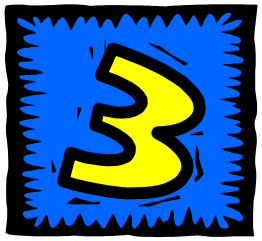
Knowledge Includes

- Personally received the PC
- Heard rumors about the PC
- Suspected or believed the complainant made a PC (even if not true)
  - Precise knowledge of content of PC is not necessary
  - Simply being aware PC occurred (regardless of the subject or content) is sufficient

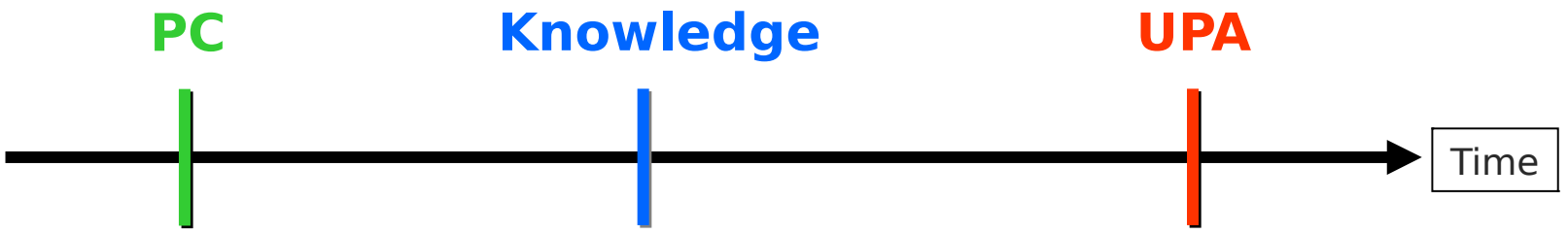


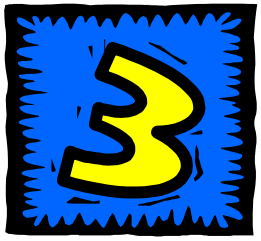
Timing is Key

Before taking or threatening an unfavorable personnel action, did the RMO know about the PC?



Let's Review





RMO Challenge

What if…

- The RMO(s) deny having any knowledge of the PC?
- No documentary evidence or corroborating witness testimony that the RMO(s) knew of the PC?

Heidi Parker

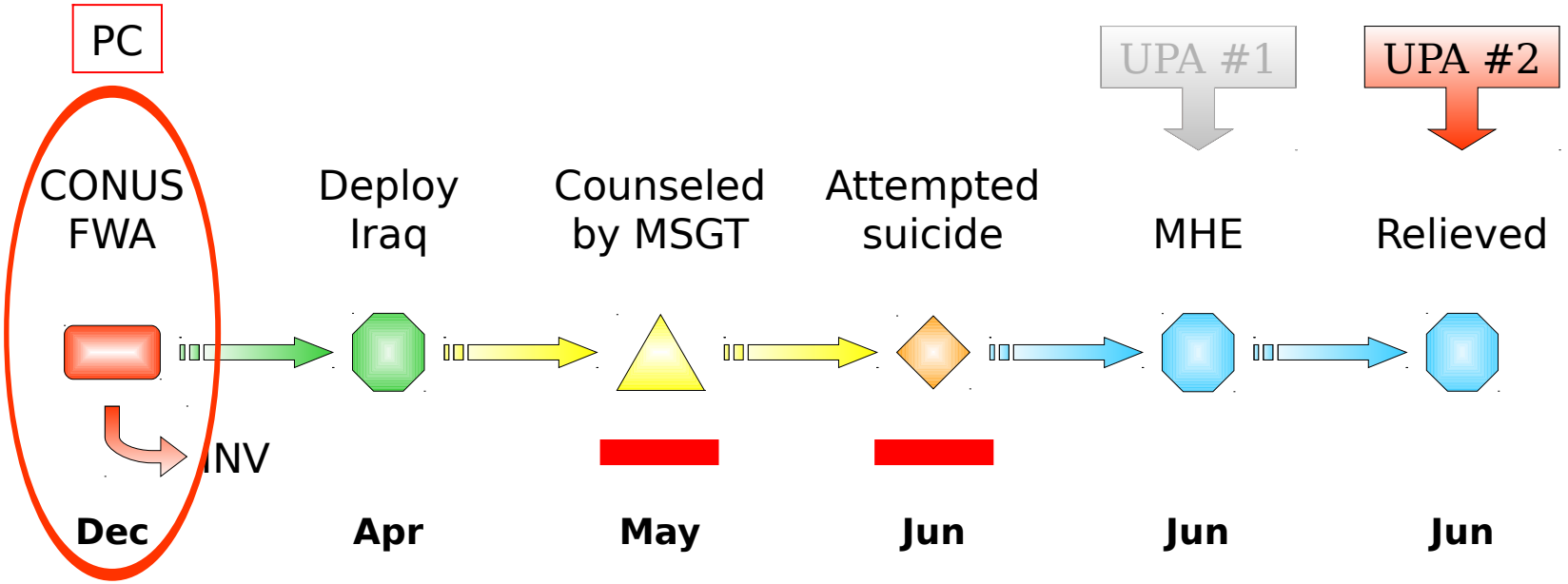
Reprisal or Independent Basis

Does a **preponderance of the evidence** establish that the “unfavorable” personnel action **would have been taken absent** the protected communication?

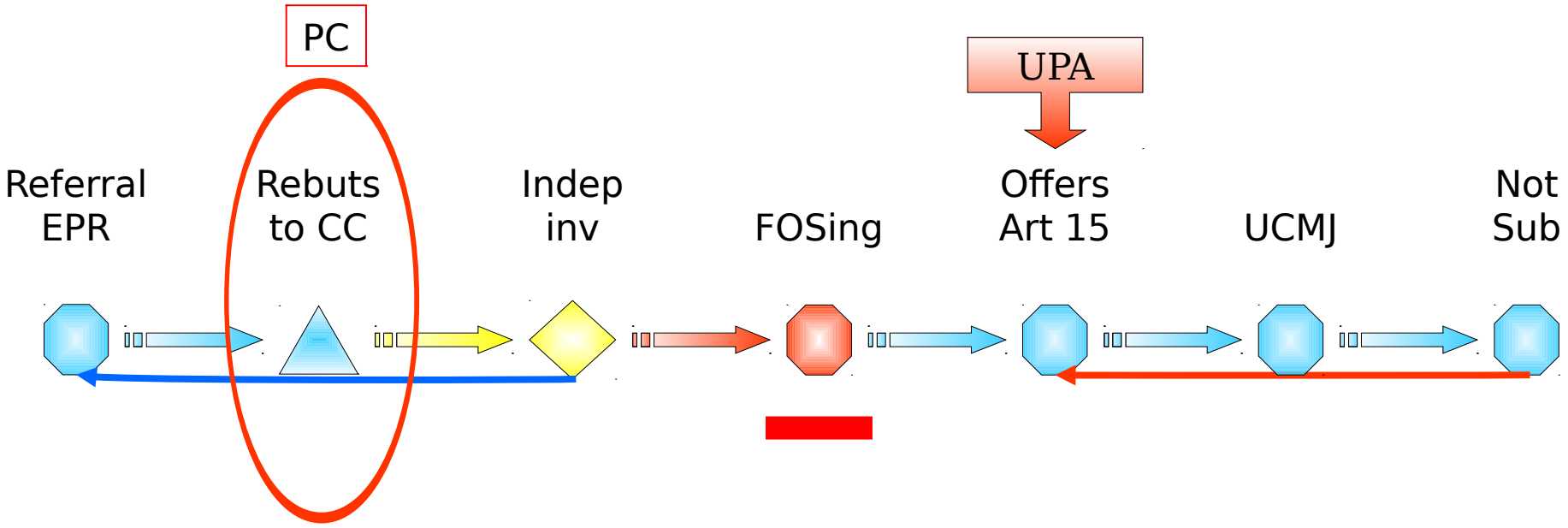
Analyze the Evidence

- Reason
  - Why did the RMO take the action?
- Reasonableness
  - Reasonable or appropriate for the offence?
- Procedural correctness
  - Did RMO(s) have authority to take the action and was the action done in accordance with regulation?
- Consistency
  - Were previous problems handled in a similar manner?
- Motive
  - Did RMO(s) take the *right* action for the *right* reason?

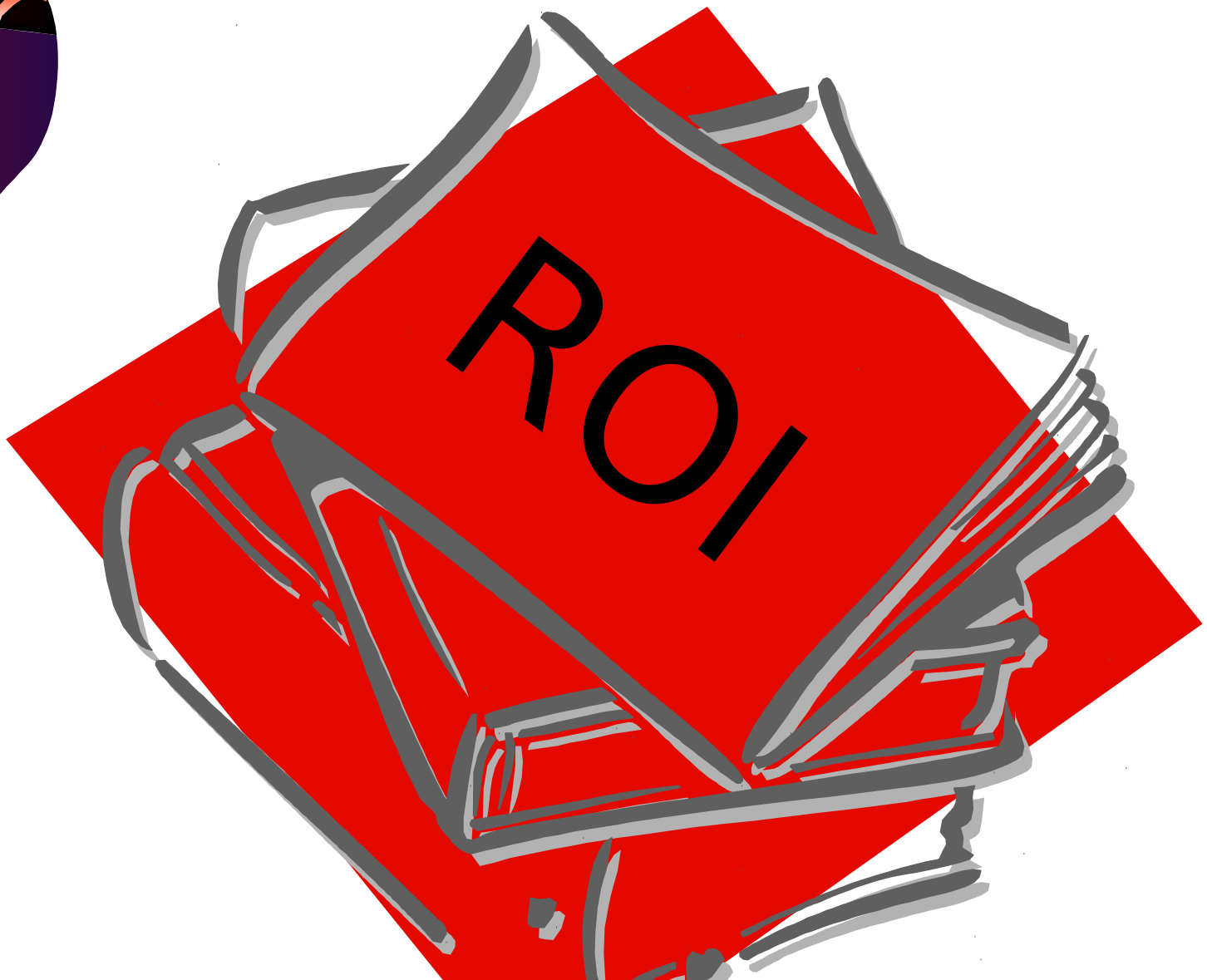
SGT Jeremiah, Supply



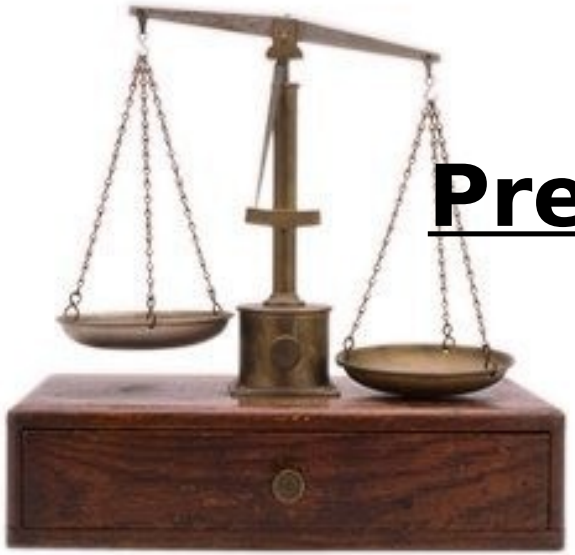
4 Sgt Glass, Flying Squadron



The Finish Line



Standard



Preponderance of the Evidence

Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it.

Report of Investigation

- 4 Questions
- Update chronology
- Analyze testimony, actions, & evidence
  - Corroborate testimony
  - Subject matter “experts”
- Determine what is credible, what is not, and why

Report of Investigation

Suggested format outlined in IGDG 7050.6

- Introduction and Summary (conclusion)
- Background: outline facts leading to the UPA
- Questions 1-3 (PC, UPA, and RMO knowledge): briefly state the evidence
- Question 4 (findings and analysis): in-depth analysis of evidence of each personnel action

Analyze the Evidence

- Update chronology
- Make sure you have all documents
- Review testimonies
- Resolve inconsistencies and contradictions
- Conduct additional interviews if necessary
- Determine if actions consistent with past practice

Facts

- Relevant
- Accurate
- Comprehensive
- Cross check and corroborate
- Proper context

Question 4

- Findings and analysis: in-depth analysis for each personnel action
  - Resolve conflicting evidence
  - Just because action was within RMO(s) prerogative does not establish that reprisal did not occur
  - You may not rule out reprisal until you establish that the RMO(s) would have taken the exact same action even if complainant had not made a PC

Analysis Matrix

Name / Sub-question	Col Smith	Maj White	CSM Brown	MSgt Green
Reason				
Reasonable				
Procedurally Correct				
Consistency				
Motive				
Linkage				

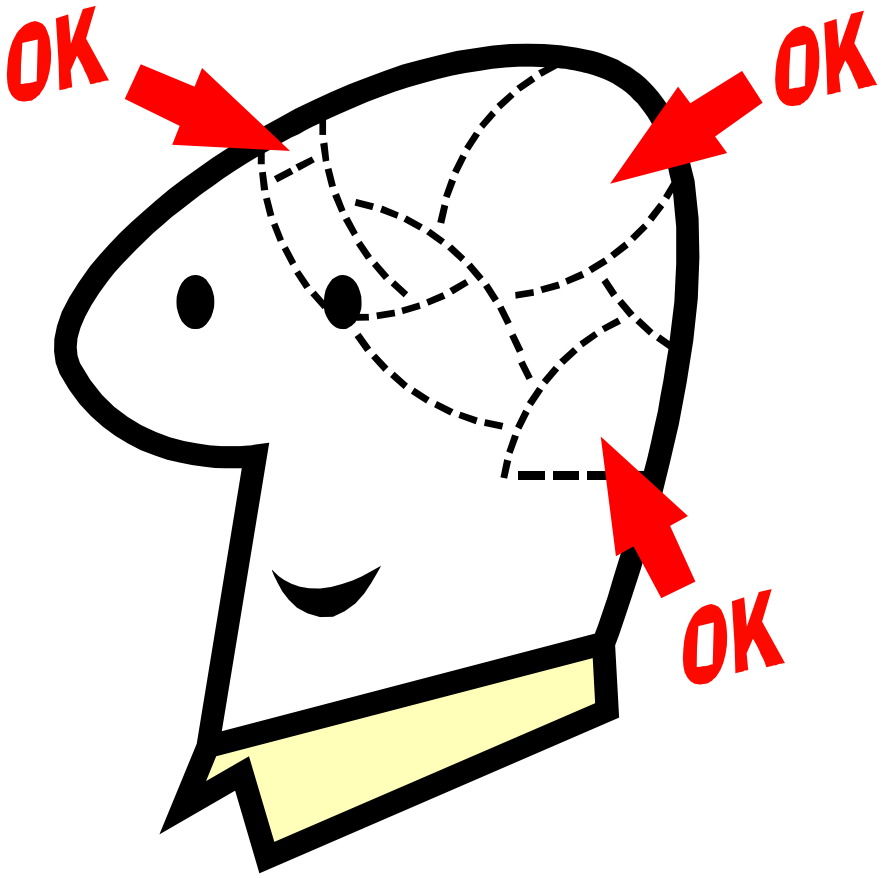
RMO's Actions

- What factors did RMO(s) consider?
  - It's incumbent on the RMO(s) to explain
- Why at that particular time?
- Inconsistencies between the evidence and RMO(s) testimony?
- Bias for complainant "going outside the chain of command?"
- What bearing did the PC have on the action?

Assistance

- Use Review Criteria Worksheet
  - IGDG 7050.6, Figure 2-1
- Ask your IG for guidance
- Consult with your local JAG for legal sufficiency
- Call Us If You Have Any Questions
  - (703) 604-8541/8507 or DSN 664-8541/8507

Mental Health Evaluations



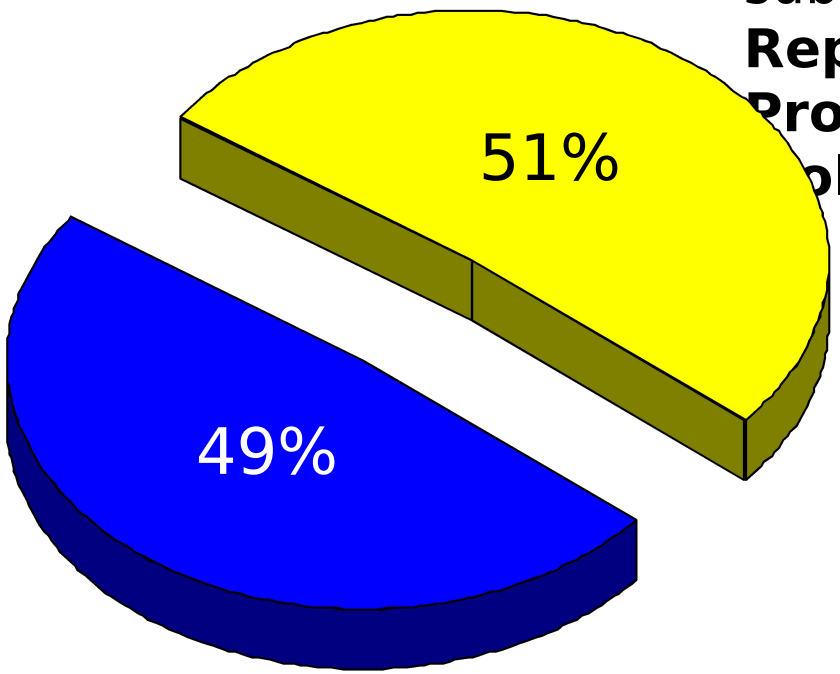
Allegations by Year

- FY 97: 57
- FY 98: 45
- FY 99: 40
- FY 00: 34
- FY 01: 24
- FY 02: 35
- FY 03: 44
- FY 04: 61
- FY 05: 35

MHE Referral

35 cases

Substantiation rate: 49%



18 – Not substantiated **Reprisal** and **Procedural violations**

17 - Substantiated **Procedural violations**

MHE Defined

DoDD 6490.1:

"***A clinical assessment*** of a Service member for a mental, physical, or personality disorder, the purpose of which is to determine a Service member's clinical mental health status and/or fitness and/or suitability for service."

Referral Requirements

DoDD 6490.1 *does not include*:

- **Self-referral (or Voluntary referral)**
- Diagnostic referral by a physician **not** in the member's chain of command
- Responsibility / competency inquiries (RCM 706)
- Family Advocacy Program
- Drug / alcohol rehab programs
- Evaluations required by Service regulations

Types of Referrals

- Non-emergency *(routine)*
- Emergency
  - Threatening imminently, by words or actions, to harm oneself/others
  - Delay of MHE would further endanger Service member or potential victims

Nonemergency Requirements

Authority to refer?

ONLY THE COMMANDING OFFICER!

2d Lt Hilton (prior service)

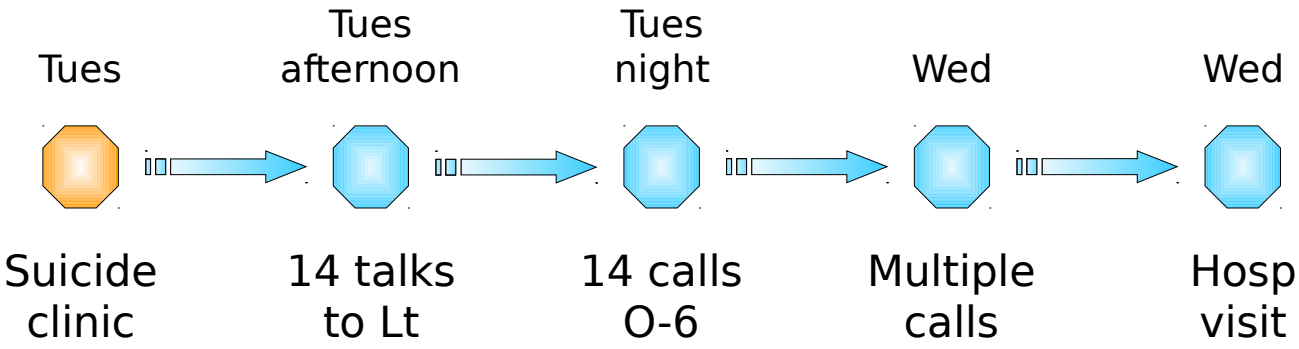
2d Lt – complainant

GS-14 – 1st line sup

O-6 – 2nd line sup

O-3 – commander

O-4 – MHCP



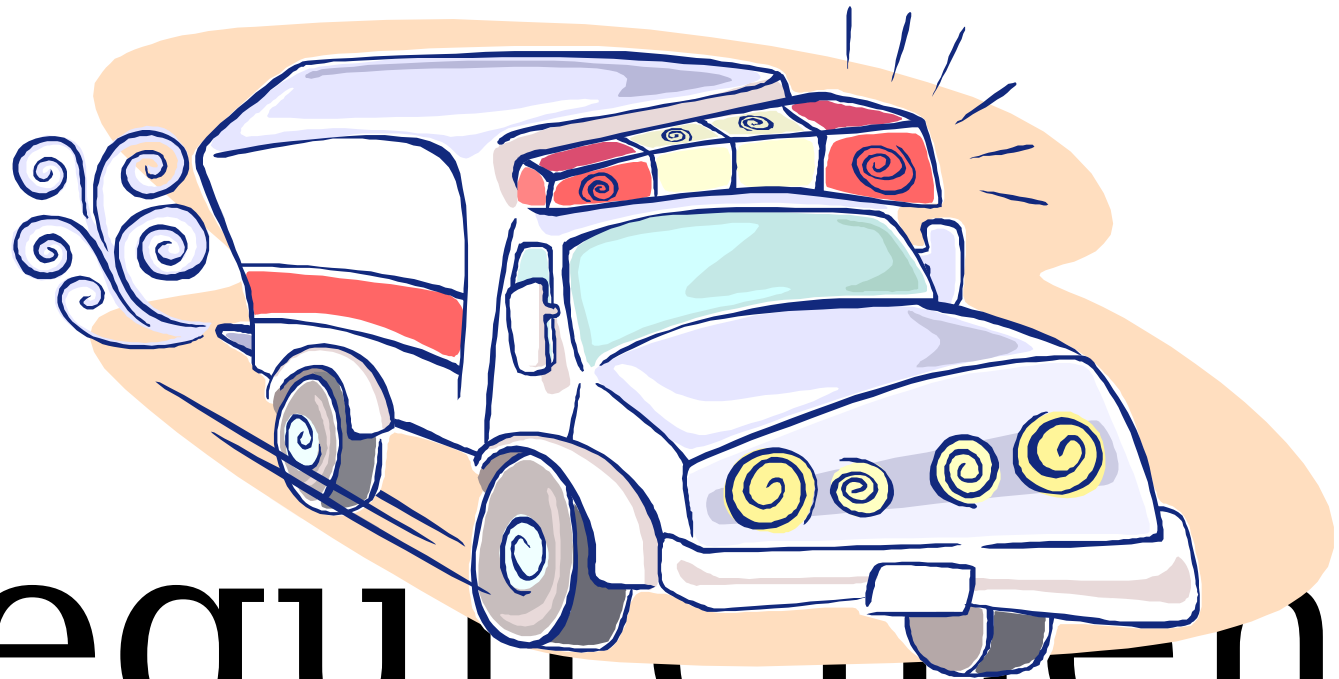
Nonemergency Requirements

- Commanding Officer's responsibilities:
  - Consult with mental healthcare provider
  - Send a memorandum to the Commanding Officer of Medical Treatment Facility
  - AT LEAST 2 BUSINESS DAYS IN ADVANCE, provide the member a referral memorandum including statement of rights

Service Member's Rights

- Two business days notice
- Consult with an attorney
- Request an IG investigation
- Seek second opinion
- No restrictions to communicate to IG, Congress, attorney, or other person

Emergency



Requirements

Emergency Requirements

- **A Commanding Officer's first priority is to the Service member and potential victims!**
- Before referral, try to consult an MHCP or other healthcare provider
- Safely get the Service member to nearest MHCP, as soon as practical

Emergency Requirements

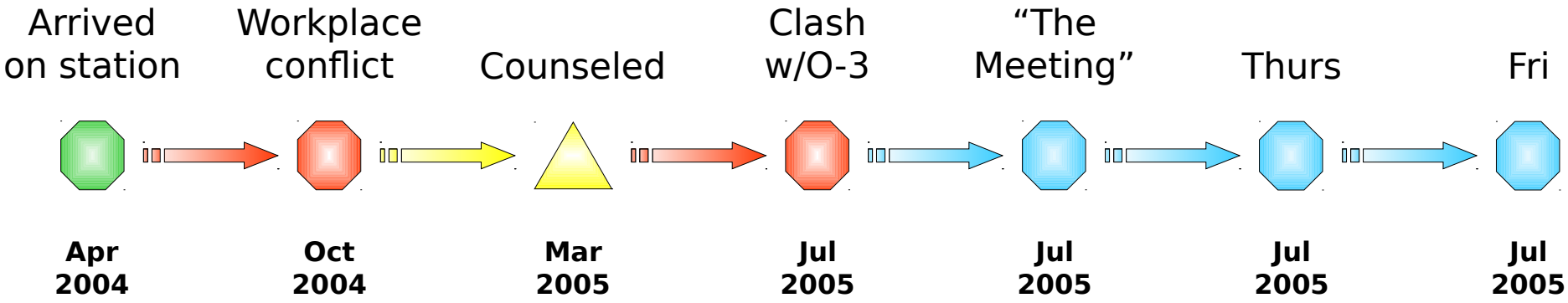
- If unable to consult with an MHCP before transporting the Service member, forward memo to MHCP as soon as practical
- **As soon as practical**, provide Service member a memorandum and statement of rights

Maj Rodgers

Maj Rodgers – complainant Capt Wilson – co-worker

Lt Col Sanders – 1st line sup Capt Bain – MHCP

Col Lance – Commander



Combat Stress Teams

Referrals to Combat Stress Team

Question:

Do the provisions DoDD 6490.1 and DoDI 6490.4 apply?

Answer:

Maybe

Questions????